

right of defendant no. 1 to remain in possession of the zerait land in question as a permanent mukarraridar.

The result is that the appeal is dismissed with costs.

JAMES, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Jwala Prasad and James, JJ.

BANKE BIHARI LAL

1930.

Nov., 14.

v.

RAM ANUGRAH CHAUDHURI.*

Bengal Tenancy Act, 1885 (Act VIII of 1885), sections 106, 107 and 109—court trying a rent suit, whether has jurisdiction to decide an issue finally and definitely decided under section 106—Rent Court, decision of, which is at variance with previous decision under section 103, whether operates as res judicata.

A court trying a rent suit has no jurisdiction to decide an issue between the parties which has already been finally and definitely decided by a decision under section 106 of the Bengal Tenancy Act, 1885.

Held, therefore, that a decision of a rent court that bhaoli rent was payable only in respect of certain areas, which was at variance with a previous decision under section 106, cannot operate as res judicata to determine the areas for which such rent shall be payable in subsequent years.

Maharaja Sir Rameshwar Singh Bahadur v. Younus Momin(1), followed.

* Appeals from Appellate decrees nos. 478, 479, 480 and 481 of 1929, from a decision of S. B. Dhavle Esqr., I.C.S., District Judge of Darbhanga, dated the 2nd January, 1929, modifying a decision of Maulavi Saiyid Abdul Hamid, Munsif of Samastipur, dated the 2nd July, 1927.

1930.

Appeal by the plaintiffs.

BANKE
BIHARI LALL
v.
RAM
ANUGRAH
CHAUDHURI.

The facts of the case material to this report are stated in the judgment of James, J.

Permashwer Dayal and Siva Narayan Bose, for the appellants.

L. K. Jha and P. Jha, for the respondents.

JAMES, J.—These appeals arise out of four suits for arrears of cash and produce rents. After the preparation of the record-of-rights there were proceedings under sections 105 and 106 of the Bengal Tenancy Act by which the tenants' cash rents were settled; and it was determined for what land *bhaoli* rent was payable. In 1923 the landlords instituted suits for arrears of rent based on the record-of-rights as finally framed under section 107 of the Bengal Tenancy Act. The tenant defendants took the defence that the rents had been reduced by agreement immediately after they were settled, and that remissions had been annually made by the landlords. They also contended that the area for which *bhaoli* rent was payable was less than that stated in the plaint. The Munsif found that since the settlement of rent the landlords of the holdings had always realised rents at lower rates than those settled; and he decreed the suits at the rents which appeared in the finally published record-of-rights before proceedings had been taken under section 105. For the area for which *bhaoli* rent was payable the Munsif, apparently not noticing that this area had been increased by the operation of the decrees under section 106 of the Bengal Tenancy Act, gave decrees to the plaintiffs in accordance with the record-of-rights as finally published under section 103-B of the Act. The plaintiffs have now again sued for arrears of rent. There is not at present any dispute between the parties regarding the amounts payable as cash rent, but the plaintiffs claimed *bhaoli* rent for the areas which were recorded as *bhaoli* in accordance

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with the decisions under section 106, while the defendants took the plea that the *bhaoli* rent was payable only for the area finally published under section 103-B of the Bengal Tenancy Act as *bhaoli* land. The Munsif of Samastipur held that the decision under section 106 operated as *res judicata* and that the decision of the rent Court in 1924, so far as it was at variance with the decrees under section 106, was without jurisdiction. His decision was reversed on appeal by the District Judge of Darbhanga, who held that the decision of 1924 operated as *res judicata* on the question of the area for which *bhaoli* rent was payable.

The learned Advocate for the plaintiff-appellants argues that the decision of 1924, so far as it is concerned with the area for which *bhaoli* rent is payable, should be regarded as affecting only the years in respect of which rent was then claimed; and that in view of the provision of sections 107 and 109 of the Bengal Tenancy Act the Munsif and the District Judge had no jurisdiction to determine what was the permanent character of this land. He relies mainly on the decision in *Maharaja Sir Rameshwar Singh Bahadur v. Yonus Momin*⁽¹⁾ in which it was held that the provisions of section 109 of the Bengal Tenancy Act had this effect, that the decision of a Rent Court, which was at variance with the previous decision under section 105 of the Act, could not operate as *res judicata*. Mr. Pitamber Jha on behalf of the respondents does not suggest that the decision under section 106 of the Bengal Tenancy Act did not operate as *res judicata* in 1924; but he argues that when the question was raised by the defendant it was necessary for the Munsif to decide it, and the effect of his decision as *res judicata* is not affected by the question of whether he committed an error of law in arriving at it. He also points out with respect to the decision in the case of *Maharaja Sir Rameshwar Singh Bahadur v. Yonus Momin*⁽¹⁾ that section 109 of the Bengal

(1) (1921) 6 Pat. L. J. 588.

1930. Tenancy Act, though it prohibits a Court from entertaining suits or applications which have formed the subject-matter of a suit under section 106, does not prohibit a Court from entertaining defences which may be at variance with the decision of revenue officers under section 106. Now, it is true that the question of whether the Court in arriving at its decision committed errors of law may not affect the question of whether the decision operates as *res judicata* between the parties; but the question is of whether the Courts in 1924 had jurisdiction to determine whether *bhaoli* rent was or was not payable for the land in dispute in the years subsequent to those years in respect of which the suits of 1923 were instituted. On this matter I consider that the case should be held to be governed by the decision in *Maharaja Sir Rameshwar Singh Bahadur v. Younus Momin*(1). Section 109 of the Bengal Tenancy Act may not in express terms prohibit a Civil Court from entertaining a defence which is at variance with a decision under section 106; but it is clear from the provisions of section 107(1) of the Bengal Tenancy Act, read with section 11 of the Civil Procedure Code, that a Court trying a rent suit has no jurisdiction to decide an issue between the parties which has already been finally and definitely decided by a decision under section 106 of the Bengal Tenancy Act. In these circumstances I consider that while the decrees of 1924 ought to be regarded as valid decrees so far as the liability of the parties during the years then in suit are concerned, the decision that *bhaoli* rent is payable only in respect of certain areas cannot be treated as *res judicata* to determine the areas for which such rent shall be payable in subsequent years, in defiance of the provisions of section 107 of the Bengal Tenancy Act.

I would, therefore, allow the appeals, set aside the decision of the lower appellate Court and restore

(1) (1921) 6 Pat. L. J. 588.

the decrees of the Munsif. The plaintiffs will be entitled to their costs throughout.

JWALA PRASAD, J.—I agree.

Appeals allowed.

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BANKE
BHEABI LALL
v.
RAM
ANUGRAH
CHAUDHURI.

JAMES, J.

APPELLATE CIVIL.

Before Kulwant Sahay and Khaja Mahammad Noor, JJ.

MUSAMMAT WALEYATUNNISSA BEGAM

v.

MUSAMMAT CHALAKHI.*

1930.

Oct., 31,
Nov., 3, 4,
20.

Mortgage—mortgagee, right of, to split up lien—mortgagor, whether can object—one of the heirs of mortgagor not impleaded in mortgage suit—suit, whether must fail in entirety—test—Code of Civil Procedure, 1908 (Act V of 1908), Order 1, rule 9, and Order XXXIV, rule 1—appeal—death of respondent—heirs already on record—application for substitution, whether necessary—limitation—Order XXII, rules 2 and 4, scope of—abatement of appeal against one of the mortgagor respondents, whether operates as abatement of the entire appeal.

Order XXII, rule 2, Code of Civil Procedure, 1908, contemplates cases where the right to sue survives against the surviving defendant in his own capacity and not as the legal representative of the other defendants. Where the right to sue survives against the surviving defendants in their capacity as representatives of the deceased defendant, the case comes under rule 4 and an application for substitution within the period of limitation is necessary.

Where, therefore, respondent died and his legal representatives were already on the record in their own capacity, held that an application for substitution under Order XXII, rule 4, was necessary.

* Appeal from Original Decree no. 176 of 1928, from a decision of Babu Shivanandan Prasad, Subordinate Judge of Purnea, dated the 19th May, 1928.